No. 78-1837

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN ELLIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 595 F. 2d 154.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on March 13, 1979. A petition for rehearing was denied on April 9, 1979 (Pet. App. C). On April 27, 1979, Mr. Justice Brennan extended the time in which to file a petition for a writ of certiorari until June 8, 1979 (Pet. App. D), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient for the jury to find that petitioners conspired to injure, oppress, threaten or intimidate citizens of the United States in the free exercise or enjoyment of their constitutional rights, in violation of 18 U.S.C. 241.

2. Whether the evidence was sufficient for the jury to find that a single conspiracy existed among all the petitioners.

3. Whether the court erred in granting immunity to two government witnesses at the outset of their cross-examination by defense counsel.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners John Ellis, James Carty, James Curley, William Jones, James Crown and Roseborough McMillan—six members of the Homicide Bureau of the Philadelphia Police Department—were convicted of conspiring to deprive eight citizens of their civil rights, in violation of 18 U.S.C. 241.[1] Petitioners were sentenced to fifteen months' imprisonment. The court of appeals affirmed (Pet. App. A) in an opinion on which we essentially rely.

1. The facts are set forth in detail in the opinion of the court of appeals (Pet. App. A-3 to A-10). In brief, this case involves petitioners' investigation of the firebombing of a dwelling in Philadelphia in October 1975 in which

[1]Separate substantive violations of 18 U.S.C. 242 (depriving inhabitants of any state of their civil rights), were also charged against petitioners Ellis, Carty and Curley (Count II), petitioners Crown, Jones and McMillan (Count III), and petitioners Carty and McMillan (Count IV). The jury could not reach a verdict on Counts II and III and returned a verdict of not guilty on Count IV.

five persons perished.[2] In the course of attempting to solve that crime, petitioners detained eight persons and subjected them to lengthy, coercive, and brutal questioning. As the result of this oppressive questioning of suspects and witnesses, the police obtained four confessions, each of which was later shown to be false in whole or in part. One of the persons who was questioned and compelled to confess, Robert Wilkinson, was convicted of five counts of murder in a state prosecution on the basis of his completely fabricated confession. He was freed only after he had served fifteen months of his sentence when one of the two actual perpetrators of the firebombing admitted his guilt (Pet. App. A-3 to A-4; see note 2, *supra*). Because the government's proof of petitioners' conspiracy was based on the entire series of coercive interrogations conducted by petitioners, it is necessary to summarize the course of those interrogations at this point.

2. Robert Wilkinson was summoned to police headquarters in the early morning hours of October 5, 1975, shortly after the firebombing of the Santiago home (Pet. App. A-4). One of the two survivors of the firebombing, a fourteen year old boy named Nelson Garcia, had seen Wilkinson near the house while it was burning and erroneously accused him of throwing the firebomb (Pet. App. A-3). Wilkinson was placed in a windowless interrogation room where he steadfastly maintained his innocence under questioning by petitioners Jones and Crown. Petitioner McMillan, who then weighed more

[2]That crime was committed by Ronald Hanley and David McGinnis. McGinnis pled guilty to the offense of injuring persons because of their race and occupancy of a dwelling, in violation of 42 U.S.C. 3631. Hanley was convicted of the same offense after a jury trial. His conviction was affirmed, and his petition for a writ of certiorari is now pending in this Court. *Ronald Joseph Hanley* v. *United States*, No. 78-6700.

than 300 pounds, then entered the room and punched and slapped Wilkinson and threatened to deliver a blow that would stop his heart (Pet. App. A-4 to A-5). McMillan told Wilkinson that there were three or four counts of murder against him and that the police had an eyewitness. Crown and Jones then obtained the illiterate Wilkinson's signature on a polygraph test consent form by threatening to take away Wilkinson's five month old child if he refused to sign it (Pet. App. A-5). Wilkinson maintained his innocence during the lie detector test and thereafter he was beaten by Crown and Jones until, at 11:05 a.m., Wilkinson signed a confession that contained details he could not have known about a crime he did not commit (*ibid.*).

3. Ronald Hanley, a Democratic committeeman in the Santiagos' neighborhood who had been implicated in Wilkinson's coerced confession, was arrested along with David McGinnis about three hours after the police began questioning Wilkinson (Pet. App. A-6). The basis for the arrest of Hanley and McGinnis (who were subsequently prosecuted successfully in federal court for the firebombing, see note 2, *supra*) was information that they had firebombed the Santiagos' car ten days before the house was set on fire (Pet. App. A-6). Hanley maintained his innocence throughout initial questioning and during a polygraph test. Thereafter, he was subjected to a prolonged and brutal beating by petitioners Ellis, Carty, and Curley (*ibid.*). Intensive interrogation followed and, at 10:45 p.m., some fifteen hours after he was arrested and twelve hours after Wilkinson "confessed," Hanley signed a statement admitting his own participation in the crime but accusing Wilkinson of throwing the firebomb (Pet. App. A-7).

McGinnis, after being beaten by Carty and McMillan, confessed to firebombing the Santiagos' car with Hanley's assistance, but denied any involvement in the burning of the house. Only many months later did McGinnis confess to federal authorities that he and Hanley had firebombed the Santiagos' house (Pet. App. A-7 to A-8).

4. Vincent and Judith Cucinotta were brought in for questioning by police on the afternoon of October 5, 1975, as the result of reports that the Cucinottas had quarreled with the Santiagos (Pet. App. A-8). The Cucinottas were separated after arriving at police headquarters. After questioning and a polygraph test, Vincent Cucinotta was beaten by a large black officer whom he tentatively identified as McMillan (*ibid.*).

Judith Cucinotta was an eyewitness to the firebombing who subsequently testified that she saw Hanley give the bomb to McGinnis (*ibid.*). At the police station on October 5, 1975, however, she denied any knowledge of who was involved. After being given a polygraph test, she was threatened by a detective with being placed in jail, with having her children put in an orphanage, and with being taken to the morgue to view the burned Santiago bodies (Pet. App. A-9). During dentention, she briefly saw Wilkinson and McCandless, both of whom appeared distressed (*ibid.*). She also overheard conversations between the detectives indicating that they were acting in concert in conducting the interrogations (*ibid.*).

5. John and Nancy McCandless were also neighbors of the Santiagos. Three detectives requested them to go to headquarters to give statements on the morning of October 5, 1975. The couple were separated for questioning. When John McCandless denied knowledge of the firebombing, he was struck by a detective and accused by McMillan of lying (*ibid.*). McMillan threatened to stop

McCandless' heart with a blow to his chest, and also threatened to beat Nancy McCandless (Pet. App. A-9 to A-10). After McMillan left, the first detective again beat McCandless until he confessed falsely to having aided Wilkinson in preparing the firebomb (Pet. App. 10).

ARGUMENT

1. Petitioners claim (Pet. 12-22) that, while there was evidence that they had engaged in a common course of conduct, there was no evidence of an agreement among them to deprive citizens of their civil rights in violation of 18 U.S.C. 241.[3] Whether the requisite conspiratorial agreement was shown to exist, however, is a purely factual question that was resolved against petitioners by a properly instructed jury.[4] The resulting judgment was affirmed by the court of appeals, and further review of this issue by this Court is unwarranted.

In any event, there was substantial, compelling evidence in the record of this case of petitioners' criminal

[3]18 U.S.C. 241 provides, in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;
>
> * * * * *
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years, or for life.

[4]Petitioners do not contest the correctness of any element of the trial court's charge to the jury.

agreement to deprive citizens of their civil rights (Pet. App. A-12):[5]

> * * * [T]here is more than ample evidence in this record of a common scheme or plan to solve a crime to the satisfaction of the conspirators by whatever means were necessary, including the violation of suspects' and witnesses' constitutional rights. All were engaged in a common endeavor. Each, the jury could find, beat one or more of the witnesses or suspects. Some moved from victim to victim. The false confession coerced from Wilkinson was tailored to fit the misinformation received from Garcia, and the false confession coerced from Hanley was tailored to fit that previously coerced from Wilkinson. All the victims were kept at the [police station] until a "solution" satisfying the common purpose was obtained by virtue of Hanley's confession. When that was accomplished McCandless was released,

[5]Petitioners mistakenly suggest (Pet. 14) that the evidence of conspiracy is deficient because convictions were not obtained on the substantive counts of the indictment (see note 1, *supra*). It is well established, however, that a conspiracy conviction can stand even where the conspirators are not convicted of any substantive offenses. *e.g.*, *United States* v. *Rabinowich*, 238 U.S. 78, 85-86 (1915); *Williamson* v. *United States*, 207 U.S. 425, 447 (1908). Petitioners also urge (Pet. 16-17) that, because some of the officers may not have been involved in or aware of each of the activities of the others, the evidence of a conspiracy was insufficient. In *Blumenthal* v. *United States*, 332 U.S. 539, 556-557 (1947), however, the Court made clear that proof of a conspiracy does not require that every member be shown to have participated in or known about every act. It is sufficient that the conspirators agreed to "the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others." *Id.* at 557 (footnote omitted).

although he had given a coerced confession inconsistent with Hanley's. The statements made by some participants disclosed knowledge of beatings by others, and thus disclosed that the conspirators were meeting together outside the interrogation rooms.

2. Petitioners argue (Pet. 23-30) that, while the evidence may have demonstrated the existence of several separate conspiracies among them, it did not establish the single group conspiracy charged in the indictment. The court of appeals correctly rejected this claim (Pet. App. A-12), holding that "[t]he jury could, and did, find that the defendants were united in a common scheme of obtaining a satisfactory solution to the Santiago slayings by the illegal means of depriving supspects and witnesses of their Constitutional rights." The decision of the court of appeals properly applies the facts of this case to settled principles of law.[6] Further review of this essentially factual issue is unwarranted.

In any event, petitioners' contention is without merit. The jury could reasonably find from the evidence that petitioners jointly agreed to the common goal of solving the Santiago slayings by illegal means. As the court noted, the statements made by petitioners during the various beatings of witnesses revealed "that the conspirators were

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[6]Petitioners' extensive reliance (Pet. 27-30) on *Kotteakos* v. *United States*, 328 U.S. 750 (1946), is misplaced. In that case, the Court held that the government had failed to prove a single "wheel" conspiracy because there was no evidence that the separate "spokes" of the alleged conspiracy had been linked together by a common agreement. *Id.* at 754-755. In this case, however, there was no central "hub" through which the conspiracy was established; rather, the proof revealed a common agreement among petitioners to achieve a single end by illegal means. As the court of appeals correctly concluded, there was ample evidence establishing that petitioners "were united in a common scheme," and *Kotteakos* is inapplicable for that reason.

meeting together outside the interrogation rooms" (Pet. App. A-12). It was also not merely coincidental that *every* possible suspect was either threatened or beaten and that many of the false facts developed in petitioners' investigation were placed in more than one of the coerced confessions. Particularly significant in this regard is the fact that each confession obtained after Wilkinson's coerced confession implicated him in the firebombing, a crime of which he was later fully exonerated. Moreover, even if the government showed separate agreements among petitioners to violate the victims' civil rights, it also showed the single greater conspiracy of which they were a part. Here, as in *Blumenthal* v. *United States*, 332 U.S. 539, 558 (1947),

> [b]y their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal.

See also *United States* v. *Kenny*, 462 F. 2d 1205,1216 (3d Cir. 1972); note 6, *supra*.

3. Petitioners argue (Pet. 31-38) that the award of immunity to two government witnesses at the beginning of their cross-examination by defense counsel was in violation of the federal immunity statute, 18 U.S.C. 6001 *et seq.*, and deprived them of their rights to a fair trial. These contentions are insubstantial.

a. The government called Hanley and Vincent Cucinotta to testify at trial conerning events that occurred during their interrogation at police headquarters. At the outset of their cross-examination, the court ruled that these witnesses could be questioned regarding their participation in the firebombing incident, a matter as to which they

each possessed a valid claim of privilege against self-incrimination. If they had asserted this privilege during cross-examination, it might have been necessary to strike their direct testimony from the record at trial. See *Davis* v. *Alaska*, 415 U.S. 308, 315-321 (1974). To avoid this eventuality, the government requested and received an order granting the witnesses immunity under 18 U.S.C. 6003.[7]

While conceding (Pet. 34) that there are no cases to support the proposition, petitioners argue that it was a violation of the federal immunity statute to grant immunity to these witnesses for the purpose of "protect[-ing] previously obtained evidence" (Pet. 33) rather than compelling new testimony. As the court of appeals correctly ruled (Pet. App. A-17), however, petitioners lack standing to raise any claim under the federal immunity statute challenging the grant of immunity to other witnesses at trial. See *United States* v. *Lewis*, 456 F. 2d 404, 410 (3d Cir. 1972).[8]

In any event, petitioners fail to demonstrate how the immunity statute was violated by the grant of immunity in this case. The statute permits a request for immunity at any time the government determines the witness is "likely

[7]18 U.S.C. 6003(b)(2) authorizes a request for immunity when the witness "has refused or is likely to refuse to testify * * * on the basis of his privilege against self-incrimination."

[8]Petitioners concede (Pet. 32 n.8) that, under the "general rule," they lack standing to challenge the propriety of the grant of immunity under 18 U.S.C. 6003. They argue only that they have standing to challenge the award of immunity if it deprives them of "a full and fair trial" (*ibid.*). Accepting this limited basis for standing (see pages 11-12, *infra*), petitioners' concession makes it unnecessary for the Court to consider any challenge to the grant of immunity based on the federal immunity statute rather than on the Constitution.

to refuse to testify * * * on the basis of his privilege against self-incrimination." 18 U.S.C. 6003(b)(2). The government's request was made precisely at that point in this case, for it was not until cross-examination that the witnesses were likely to be probed on matters implicating them in the firebombing. Petitioners do not dispute that the request for immunity properly could have been made at the opening of direct testimony (Pet. 33); deferring the request for immunity until the point at which incriminatory examination became "likely" (18 U.S.C. 6003(b)(2)) is not in violation of the statute.[9]

b. Petitioners argue (Pet. 35-38) that the grant of immunity at the beginning of cross-examination deprived them of a fair trial because the immunity "enhanced the credibility of the witness" (*id.* at 36) during the cross-examination and thereby "dulled" its effect. But petitioners do not explain why a credible cross-examination is a dull one. If the jury believed the witnesses were more credible after the grant of immunity, any testimony favorable to petitioners on cross-examination would have carried greater force. Conversely, if the jury believed the witnesses were less credible prior to the grant of immunity, their testimony on behalf of the government would have been discounted. It would thus appear far more likely that petitioners benefitted from the timing of the immunity instruction, rather than

[9]Petitioners attempt to differentiate between the use of a grant of immunity "as a vehicle to advance the investigation and prosecution of the case" (Pet. 34)—which they concede is proper—and its use as a "shield[] to protect previously obtained evidence" (Pet. 33)—which they claim is not. But this distinction lacks substance. As the facts of this case demonstrate, it may often be necessary to protect previously obtained evidence in order to advance the prosecution of a case. Certainly nothing in the immunity statute prohibits the use of immunity for this purpose.

were disadvantaged by it. Furthermore, the trial court properly instructed the jury on the weight to be given to immunized and non-immunized testimony, and petitioners do not challenge these instructions.[10] Petitioners have thus failed to demonstrate any prejudice resulting from the grant of immunity that deprived them of a fair trial.

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[10]The court gave the following instruction (Tr. Vol. XIV (March 20, 1978), 184-185):

> The testimony of an immunized witness should be examined by the jury with care and with greater care than that of an ordinary witness.
>
> That is not to say that because testimony is given by an immunized witness that it should be completely rejected or completely accepted merely because that witness had been immunized.
>
> You may find that by reason of the immunity, the likelihood of it being truthful and accurate is lessened. On the other hand, you might conclude that the fact that the person can't be prosecuted for what he may then be testifying to would make his testimony more reliable or less likely to be false than if he had not been granted immunity.
>
> It's for you to determine what weight to give the testimony of all witnesses.

This instruction was substantially that given in *United States* v. *Fineman*, 434 F. Supp. 197, 204 (E.D. Pa. 1977), aff'd 571 F. 2d 572 (3d Cir. 1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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